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IN THE

Supreme Court of the United States

October Term, 1969

No. ~~69-[illegible]~~ 66

GEORGE A. ROSENBLOOM, *Petitioner*

v.

METROMEDIA, INC., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Constitutional Provisions involved	3
Statement of the Case	4
Proceedings Below	6
Reasons for Granting the Writ	8
Conclusion	16
Appendix A	17
Appendix B	28
Appendix C	49

TABLE OF CITATIONS

Cases:

Barr v. Mateo, 360 U.S. 564 (1960) 12

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) 9, 15

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 8, 11, 12, 15, 16

Garrison v. Louisiana, 379 U.S. 64 (1964) 9

Griswold v. Connecticut, 381 U.S. 479 (1965) 13

Manuel Enterprises v. Day, 370 U.S. 478 (1962) 4

Mounce v. United States, 355 U.S. 180 (1957) 4

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 2, 6, 8, 9, 11, 12, 14, 15, 16

Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 191 A.2d 662 (1963) 12

TABLE OF CITATIONS—(*Continued*)

Cases: Page

Rosenblatt v. Baer, 383 U.S. 75 (1966) 9, 11

Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737 (1969) 1

Roth v. United States, 354 U.S. 476 (1957) 4

St. Amant v. Thompson, 390 U.S. 727 (1968) 9, 14, 16

Time, Inc. v. Hill, 385 U.S. 374 (1967) 12, 13

Time, Inc. v. McLaney, 406 F. 2d 565 (5th Cir. (1969) 12

United Medical Laboratories v. Columbia Broadcasting System 404 F. 2d 706 (9th Cir. 1968) 12

Constitutional Provisions:

United States Constitution:
First Amendment 3

Other Authorities:

Privacy, Defamation, and the First Amendment: The Implications of Time, Inc. v. Hill, 67 Colum. L. Rev. 926 (1967) 9

The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1965 Sup. Ct. Rev. 191 (1964), by Kalven 9

The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267 (1967), by Kalven 9

The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L. J. 642 (1966) 9

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in *George A. Rosenbloom v. Metromedia, Inc.*, entered September 15, 1969. That judgment reversed a judgment of the United States District Court for the Eastern District of Pennsylvania and remanded this case to the District Court for the entry of a judgment in favor of the respondent.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed as Appendix A hereto. The opinion of the District Court for the Eastern District of Pennsylvania, which is dated August 28, 1968, is reported at 289 F. Supp. 737 (E.D. Pa. 1968). It is printed as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1969, and is printed as Appendix C hereto. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the rule established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), be broadened to prohibit a private citizen who is neither a public official nor a public figure from recovering damages for a defamatory falsehood relating to his involvement in a matter of public interest unless he proves that the statement was made with "actual malice"?

2. If a private citizen who is neither a public official nor a public figure must prove, in order to recover damages, that a defamatory statement was made with "actual malice," was the evidence in this case sufficient to support this finding by the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A jury awarded damages for libel in this case to the petitioner, Mr. Rosenbloom, a small independent distributor of magazines promoted by legitimate nudist groups, who was wrongfully accused by Metromedia's Philadelphia radio station of being a "smut distributor" and "girlie-book peddler," and who was found by an instructed jury not guilty of the charges.

To avoid confusion from unrelated issues, it is important to emphasize what the case does not involve. There is no issue concerning obscenity or "hard core" pornography. The publications distributed, as has been mentioned, were found to be not obscene as a matter of law by the trial judge when Mr. Rosenbloom was tried for the possession of obscene material, and the jury was directed to return a verdict of acquittal. (R. 224a) These findings were in strict accordance with the settled constitutional doctrine of this Court.[1] That phase of events has consequently been resolved, and this case involves only the question whether a jury verdict awarding general and punitive damages for libel should be disturbed.

When this controversy arose in 1963, Mr. Rosenbloom had just launched his business, after spending several years as a paperback book salesman. He had accepted an offer that May to become a distributor for the Outdoor American Publishing Company, after thoroughly investigating the propriety of the company's magazines promoting legitimate nudism. He handled only their publications, eschewing more flamboyant and controversial materials. (R. 97a)

It was a small but growing business. His home was his office and his stock was stored in a barn rented from a neighbor. By October 1, he had built his business from nothing to 60 outlets. (R. 98a) On that day the police were beginning a campaign to rid the city of pornography. Mr. Rosenbloom was arrested as he was making a delivery to a center

[1] *Mounce v. United States*, 355 U.S. 180 (1957); *cf. Roth v. United States*, 354 U.S. 476 (1957), *Manuel Enterprises v. Day*, 370 U.S. 478 (1962).

city newsstand—the arrest was largely fortuitious, since the campaign was directed not at his publications, but at more lurid material. Three days later, the police raided his home and the rented barn he used as a warehouse, seizing large quantities of his magazines at both places. Mr. Rosenbloom, who had been released on bail after his first arrest, surrendered to the police upon hearing of the raids and was rearrested. (R. 131a)

Both the arrests and the raids were held by a court to be wrong, of course.

But long before his eventual exoneration in court, the media in Philadelphia had themselves judged his case. Two series of radio newscasts on Station WIP, which is managed and controlled by the respondent Metromedia, Inc., are involved in this libel case. The first series began with an announcement headlined "City Cracks Down on Smut Merchants," which was broadcast October 4, 1963, on the six o'clock news. The portion of that newscast bearing on Mr. Rosenbloom's arrest reported (1) that the police had raided his home; (2) that the police had confiscated a thousand magazines and arrested Mr. Rosenbloom on charges of possession of obscene literature; (3) that the police had also raided a barn rented by Mr. Rosenbloom and confiscated obscene books there; and (4) that police Captain Ferguson, who led the raids, believed the police had "hit the supply of the main distributor of obscene material in Philadelphia." (R. 26a, 350a)

This newscast was repeated, with minor changes, during the evening of October 4 and again the next day. (R. 353a-360a) The fact that Mr. Rosenbloom was arrested and his magazines seized was reported accurately. In the initial newscasts, however, the station failed to qualify its description of the books seized in the second raid as "allegedly" obscene, and therefore assumed responsibility for their characterization as obscene, a characterization which Mr. Rosenbloom's later acquittal proved erroneous. In addition, of course, the beliefs of the arresting officer reported by

Station WIP that Mr. Rosenbloom was a major distributor of obscene material were in error.

The second group of newscasts were on October 21, October 25 and November 1. These broadcasts varied in language and content. At different times, however, Station WIP referred to Mr. Rosenbloom and the Outdoor American Publishing Company, as "girlie-book" or "smut" peddlers and erroneously stated that they were attempting to force the police and news media "to lay off the smut literature racket." (R. 369a-401a)

PROCEEDINGS BELOW

District Court

Mr. Rosenbloom brought this suit for libel as a diversity action under 28 U.S.C. §1332 in the District Court for the Eastern District of Pennsylvania. The case was tried before a jury in 1968. The trial judge rejected an instruction submitted by the respondent based upon *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and succeeding cases on the ground that Mr. Rosenbloom was not a public figure, and instead instructed the jury according to Pennsylvania law. (R. 442) The jury was told that to return a verdict for general damages, they would need to find (1) that one or more broadcasts were defamatory, (2) that the statement could reasonably be taken to have referred to the plaintiff, (3) that the station had violated its privilege "to report the news . . . so long as it does so fairly and accurately, and so long as that privilege was exercised reasonably and with reasonable care," and (4) that the statement was false. (R. 324a-328a)

In order to return punitive damages, the jury was told that it would need to find malice as that term was defined by Pennsylvania law; *i.e.*, "that these broadcasts were published with a bad motive or with reckless indifference to the rights of others." (R. 333a)

The jury returned a verdict for Mr. Rosenbloom, awarding actual damages of $25,000 and punitive damages of $725,000. The trial judge reduced the total verdict to $250,000 on remittitur, which Mr. Rosenbloom accepted. Metromedia's motions in the alternative for judgment n.o.v. or a new trial were denied in a lengthy opinion by the trial judge which held that the evidence was sufficient to justify an award of punitive damages under Pennsylvania law, and that Mr. Rosenbloom should not be required to show actual malice in the constitutional sense since he was not a public figure. (R. 435a-456a, App. B)

Court of Appeals

The Court of Appeals refused to attach controlling weight to the absence of a public figure. In view of "the established public interest in the subject matter" of the broadcasts the court concluded that "proper accommodation between the First Amendment protections and the state law of defamation is found by requiring a plaintiff to meet the standard of proof formulated in *New York Times Co. v. Sullivan*. . . ."

The court next scrutinized the record to determine "whether the evidence met the federal actual malice standard so as to be a proper case for the jury." The petitioner had introduced uncontradicted evidence that when he had visited the station during the second series of broadcasts and before their conclusion, a receptionist had directed him to speak with a station representative on an interoffice telephone. The representative, a part-time news announcer, hung up when Mr. Rosenbloom challenged the accuracy of the newcasts. (R. 135a-138a) Although the jury was obviously influenced by this factor in awarding punitive damages,[2] the Court of Appeals concluded that neither this evidence nor evidence of the station's failure to investigate the matter or even to look

[2] The trial judge gave prominent attention to this fact, together with the facts mentioned in the text, in upholding the jury verdict for punitive damages. (R. 449a, App. B).

at his magazines before terming them "obscene," nor the "highly inflammatory references" to "girlie-book peddlers" and "smut distributors" in the second series of newscasts provided "evidence of actual malice with a requisite convincing clarity to create a jury issue under federal standards."

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals, in Applying the Rule of New York Times Co. v. Sullivan to a Suit for Libel by a Strictly Private Citizen Involuntarily Involved in a Matter of Public Interest, Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 279 (1964), this court held that "the principle that debate on public issues should be uninhibited, robust and wide open" required "a federal rule that protects a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'. . . ." The petitioner in no way seeks to impair the full sweep of *New York Times* or the subsequent cases in which the Court has carefully explored the radiations of that decision.

One consequence of this appropriate case-by-case development of doctrine, however, is uncertainty on the part of lower courts concerning the ultimate reach of *New York Times* to strictly private citizens. A majority of the Court joined Part I of Chief Justice Warren's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967), which applied the requirement of actual malice to suits for defamation by public figures—that is, persons

> "who do not hold public office at the moment [but] are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164.

Other decisions have studied the questions of who is a public official and what the evidentiary requirements for a showing of actual malice must be. *E.g.*, *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Garrison v. Louisiana*, 379 U.S. 64 (1964). But this Court has not since its decision in *Butts* had occasion to consider the need for, or reasons against, an extension of *New York Times*. Several commentators have suggested, at the time of the original decision and in the wake of later cases, that there is no logical, workable stopping point for the *New York Times* rule short of the entire law of libel. *See, e.g.*, Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267 (1967); Comment, *Privacy, Defamation, and the First Amendment: The Implications of Time, Inc., v. Hill*, 67 COLUM. L. REV. 926 (1967); Comment, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L. J. 642 (1966); Kalven *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (1964).

The Court of Appeals decision here seemingly embraces that approach in defining the sweep of *New York Times* to include, essentially, all reports dealing with matter of "public interest," regardless of the public or private character of the person libeled. This Court has not yet so decided, however, and in the interest of settling the question and for the guidance of both federal and state courts, we respectfully suggest that the question deserves the attention of this Court.

Mr. Rosenbloom was a private citizen before his arrest, unknown to the public and of no interest to it. His arrest was perhaps of interest to the public, but even that interest arguably was kindled chiefly by the misrepresentations of the media. Station WIP apparently concluded that the public had no interest in his side of the story in re-

buffing his efforts to protest the later broadcasts and correct the record.

Mr. Rosenbloom was, however, grievously injured by the onslaughts of the media. Although the trial court denied special damages because his losses could not be directly traced to the WIP newscasts, rather than other media accounts and mis-accounts of his arrest, it is undisputed that he lost roughly half his outlets within a month of his arrest and eventually went out of business. (R. 331, [illegible])

Mr. Rosenbloom's hurt was important to him, of course, but of general significance is the threat to other citizens' reputations if the Court of Appeals decision is to be the law. Many private men are arrested for reasons that subsequently prove erroneous. Their prosecution gravely inconveniences them, even if they are acquitted. But news reports of their difficulties, often inflated, sometimes sensationalized, may do much more disastrous damage to their families, their reputations, their businesses, their friendships.

Consider the case of a man whom a magazine may accuse of Mafia connections, perhaps on no stronger basis than an Italian name and an affection for Italian restaurants also patronized by actual Mafia members. The public has, or can be persuaded by the media to have, an interest in such speculations. A public official, as *New York Times* observed, generally has access to the media to rebut such innuendoes. But as Mr. Rosenbloom's experience shows, a private citizen generally does not. If such a person cannot resort to a court to protect his reputation, the result is harsh. The same is true of a man pointed out in the press, on the basis of anonymous tips or "investigative reporting," as being a slumlord, a playboy, a gambler, a war profiteer, a loan shark, a purveyor of adulterated foods, a racist, a Communist, a child molester, a dupe for sinister forces, or any number of other things.

The questions presented by this case, and by the hypothetical cases suggested, are difficult. Robust public debate inevitably threatens private reputations, but, just as inevitably, any judicial attempt to protect reputations threatens the public's interest in debate. The petitioner agrees that the decision in *New York Times* is the appropriate reference point "in all libel actions arising from a publication concerning public issues." *Butts*, 388 U.S. at 147 (opinion of Harlan, J.). But this reference point does not imply that the requirement of actual malice announced in that case should become the constitutional rule in all cases. The differences between this case and earlier cases examined by the Court suggest the need for a careful appraisal of First Amendment needs in this new context.

Since the target of the defamatory utterances here was not a government official, there is no danger that a verdict for the petitioner would border dangerously close upon punishing the respondent for seditious libel against the state. *Cf. New York Times*, 376 U.S. at 277-78. And since he was also not even a public figure, there is markedly less reason to fear, in cases such as this, that the complexity of modern life has so blurred the lines between governmental and non-governmental functions and institutions as to make any distinction unworkable. *Butts*, 388 U.S. at 163 (opinion of Warren, C. J.).

Moreover, Mr. Rosenbloom as a private citizen involuntarily exposed to public attention has not assumed the risk of vigorous, even inaccurate criticism, by accepting public office or thrusting himself into the "vortex" of a public controversy, *Cf. id.* at 155 (opinion of Harlan, J.): *Rosenblatt v. Baer*, 383 U.S. 75, 86 n. 12 (1967); *New York Times*, 376 U.S. at 273.[3] Nor could he hope that the media would publish or the public notice any rebuttals

[3] It could hardly be argued that a private citizen such as Mr. Rosenbloom has thrust himself into a public controversy by distributing magazines already found innocuous by this Court, see note 1 *supra*; the case might be quite different were more controversial material involved.

he might voice. He did not, as already mentioned, have the platform of public office from which to speak, or the privilege enjoyed by an official, *cf. id.* at 283; *Barr v. Mateo*, 360 U.S. 564 (1960). And the public had no "independent" interest in him that would assure its attention to his version of events. *Cf. Butts*, 388 U.S. at 154 (opinion of Harlan, J.), 164 (opinion of Warren, C. J.)

In short, neither the peculiar importance of utterances against the government emphasized in *New York Times* nor the plaintiff's "prior activities and means of self-defense" relied upon in *Butts* demonstrate a special need to protect First Amendment values in this case or justify a narrowly limited measure of judicial protection for Mr. Rosenbloom's reputation. Accordingly, there is a serious question whether the stern rule announced in those cases should be applied here.

Since all must share concern for First Amendment values, it should be pointed out that there are alternative standards to insure breathing space for those values in cases such as this. This Court, upon consideration, might conclude that the qualified privilege the law of Pennsylvania accords the media to report the news so long as they exercise reasonable care, allows them sufficient leeway in cases involving private persons such as Mr. Rosenbloom. *See Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A.2d 662 (1963). The Court may well decide upon some other standard but the importance of the question to many private citizens[1] and the nature of the discussion in the lower courts show the need for review by this Court. *See Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969); *United Medical Laboratories v. Columbia Broadcasting System*, 404 F.2d 706 (9th Cir. 1968).

Time, Inc. v. Hill, 385 U.S. 374 (1967) does not foreclose the question. This Court there held that a private citi-

[1] It would be superfluous for the petitioner to accumulate statistics showing the substantial number of libel cases involving private persons currently in progress and presenting the same question.

zen of no public fame must show actual malice to recover damages in a suit for invasion of privacy. But the Court carefully, and repeatedly, noted that defamation was not involved there, and that different considerations would be presented if it were. *Id.* at 384 n.9, 390-91. And indeed the important differences between a suit for invasion of privacy and a suit for defamation demonstrate that a First Amendment standard appropriate for the former is not necessarily appropriate for the latter.

A suit for invasion of privacy protects the "right to be let alone." A libel suit, on the other hand, roots in damage to the plaintiff's reputation. To the extent the former protects an interest not included in the latter, the values it guards are subjective in the extreme. The monetary equivalent of a tarnished reputation may be difficult to calculate, but the hurt itself is clear enough. The test commonly employed for defamation—that the statement tends to lower the subject in the eyes of the community—shows that the insult required is one appreciated and understood as such by the rest of the community.

Where one can justly ask "to be let alone," however, is anything but a matter of community consensus, except in the most intimate areas of life. *See Griswold v. Connecticut*, 381 U.S. 479 (1965). There *is* an important interest in being "let alone," but its peculiarly personal, nonmonetary quality makes effective judicial protection difficult when First Amendment values are involved.

This Court stressed that "mental distress" rather than "damage to reputation" was at stake in *Hill*. 385 U.S. at 385 n. 9. And in explaining why Mr. Hill should be accorded less judicial protection in order that the First Amendment might be accorded more, the majority recognized the difficulty of compensating citizens for distress from mere publicity:

> Exposure of the self of others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a soci-

> ety which places a primary value on freedom of speech and of press.

Id. at 388.

Exposure of one's reputation to damaging, defamatory calumny should not be "a concomitant of life in a civilized community," however. The injury is clearer, less justifiable and more susceptible to judicial redress. The public may, in good taste or not, have a legitimate interest in, for example, the experiences of the Hill family, even if publicity embarrasses those affected. The public does not, however, have a legitimate interest in false information and defamatory comments concerning a private citizen.

B. The Determination by the Court of Appeals that the Evidence in this Case Was Constitutionally Insufficient to Support a Finding of Actual Malice Presents an Important Question that this Court Should Decide if the Court Concludes the Standard of Actual Malice Should Apply to this Case.

The petitioner has argued that the rule of *New York Times* should not be extended to this case. If this Court disagrees, however, the petitioner alternatively believes that the evidence was sufficient to support a finding of actual malice.

To demonstrate actual malice, a plaintiff must show that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. As this Court has emphasized, the burden of proof to show such reckless disregard of the truth with the requisite "convincing clarity" is heavy:

> There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)

This Court has held in earlier cases, that neither a failure to investigate beforehand nor a refusal to print a retraction after the fact meets this burden. *See id.* at 733 (investigation); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84 (1967) (investigation); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967) (opinion of Harlan, J.) (investigation); *New York Times Co. v. Sullivan*. 376 U.S. 254, 286 (1964) (retraction).

The Courts of Appeals, in attempting to apply these decisions, considered "seriatim" and rejected as individually insufficient each discrete item of evidence. But the important point is that evidence is additive. And it is our view that the failure of the Court of Appeals to consider the evidence in this fashion caused it to depart from the decisions of this Court in overturning the jury verdict. Station WIP not only failed to investigate; it also rudely rebuffed Mr. Rosenbloom when he asked the station to correct the newscasts. The second series of broadcasts was also, as the district judge emphasized, inflammatory in its references to "girlie-book" and "smut" peddlers and its repeated innuendoes that Mr. Rosenbloom was attempting to force authorities "to lay off the smut literature racket."

Although the trial judge refused to charge the jury in the language of *New York Times*, the jury to all practical effect made a finding of actual malice in awarding punitive damages. The trial court instructed the jury that it could award punitive damages if it found "a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to the truth." (R. 333a) The cavalier disregard for the truth demonstrated by station WIP, when considered in conjunction with its disdain for Mr. Rosenbloom when he attempted to bring the truth before it, provides ample evidence to support a verdict under these instructions.

Here, as in *Butts*, the counsel for the plaintiff did not seriously contend that the defendant was motivated by preexisting animosity toward the plaintiff. *Cf. Butts*, 388 U.S. at 156 n. 20. Station WIP was accordingly not prejudiced by

reference to "a bad motive" in the instructions. The remainder of the instructions were strikingly similar to the instructions in *Butts* which the Court concluded provided adequate assurance that the jury had found a reckless disregard for the truth as required by *New York Times*.[5]

As this Court pointed out in *St. Amant v. Thompson*, 399 U.S. 727, 730 (1968), " 'Reckless disregard' . . . cannot be fully encompassed in one infalliable definition. Inevitably its outer limits will be marked out through case-by-case adjudication. . . ." If the Court concludes that the rule of *New York Times* should be extended to this case, it should utilize this occasion to set further guidelines concerning the evidentiary requirements to support a finding of "reckless disregard."

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN PAUL
Attorney for Petitioner

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[5] This case, unlike *Butts*, was tried after the decision in *New York Times*. But since the application of a requirement of actual malice here would represent an extension of that decision, and of *Butts*, we do not feel that under these circumstances the petitioner should be forced to face the delay and expense of a new trial.

APPENDIX A

Opinion of the United States Court of Appeals

for the Third Circuit

(Filed September 15, 1969)

SEITZ, *Circuit Judge.*

George Rosenbloom (plaintiff) brought an action for libel in the district court based on diversity of citizenship against Metromedia, Inc. (defendant), alleging that certain radio broadcasts in October of 1963 by WIP, a radio station in Philadelphia managed and controlled by defendant, injured his reputation. The case was tried to a jury, and, after defendant's motions for a directed verdict and for binding instructions were denied, a verdict was returned in favor of the plaintiff for $25,000 in compensatory damages and $750,000 in punitive damages. The district judge reduced the punitive award to $250,000 on remittitur, which was accepted by plaintiff, but denied defendant's alternative motions for judgment n. o. v. or a new trial. 289 F. Supp. 737 (E. D. Pa. 1968). Defendant appeals.

In the spring of 1963, plaintiff became a distributor in and around the Philadelphia, Pennsylvania area of nudist magazines published by Outdoor American Company. In fall of 1963, acting upon complaints concerning obscene magazine and book sales in the city, Captain Clarence Ferguson of the Philadelphia Police Department's Special Investigations Squad carried out first an investigation and then, after October 1, 1963, a series of arrests in connection with the investigation. A raid was made on plaintiff's home and warehouse, his magazines were confiscated, and he was arrested.

The first series of allegedly defamatory radio broadcasts dealing with the raids were made on October 4 and

5 as part of the regular newscasts on the hour and half hour. The first such broadcast was that of October 4, 1963, at 6:00 p.m.:

"City Cracks Down on Smut Merchants

"The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3000 obscene books. Captain Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

This news report was repeated as part of later news broadcasts some seven times with substantially the same text. The variations involved the use of the word "reportedly" for "allegedly", the use of "the Police believe" for "Captain Ferguson says he believes" in the third sentence, the insertion of the word "allegedly" before "obscene books" in the second sentence, and the substitution in the last broadcast of the phrase "smutty periodicals" for the reference to "obscene books." Apparently, the only alleged libel in the first series was in the failure to use the word "allegedly" in certain places in the quoted broadcast.

The second series of allegedly defamatory broadcasts occurred on October 21, 25 and November 1, again as part of the regular news broadcasts on the hour and half hour. They consisted of reports of a law suit brought by plaintiff and two publishers to enjoin the allegedly illegal arrests and defamatory statements. The first of this series was broadcast October 21 at 8:30 a.m.:

"Federal District Judge Joseph S. Lord, Third, will hear arguments today from two publishers and

a distributor . . . all seeking an injunction against Philadelphia Police Commissioner Howard Leary . . . District Attorney James C. Crumlish, Jr. . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.

"The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography."

Succeeding reports were in a similar vein. All made reference to "smut" and/or "girlie-books" and implied that the distributor and the two publishers wanted to stop all obscenity raids throughout the city, even as against literature that was in fact pornographic and even though plaintiffs had nothing to do with its distribution. The implication was not justified since plaintiffs had only sought to prevent alleged police harassment of them alone and asserted that their publications were not obscene. In one such broadcast "allegedly" was omitted before "smut distributors". At no time did the broadcasts mention the names of the distributor and publishers involved in the lawsuit. Although defendant contends to the contrary, we shall accept the district court's conclusion that certain of the statements in the two series were defamatory as a matter of Pennsylvania law and, in the circumstances, created a jury issue under such law.

Defendant's principal contentions on appeal are that the district court erred in refusing to hold that the action was controlled by the federal controlled by the federal constitutional standard of "actual malice" as defined in Times v. Sullivan[1] and that when so tested the evidence was insufficient to submit the case to the jury.

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[1] 376 U. S. 254 (1964).

I.

Freedom of speech and of the press are of course secured by the First Amendment. Practical implementation of those important principles is found in several recent Supreme Court pronouncements, although admittedly none are factually controlling here. Those cases teach that the First Amendment guarantees must be applied broadly lest they suffocate for lack of breathing room. They demonstrate that some degree of abuse is inescapable if the press is to discharge its function adequately; that such abuse must be tolerated or the guarantee will be unduly chilled by the threat of defamation actions, with resultant damage to the general public which is the primary beneficiary of the guarantee.

But actions for defamation of character have long been recognized as serving an important function in protecting the rights of citizens. "The rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes." Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (C. A. D. C. 1966). The problem is to find a standard reflecting an accommodation between the competing values in the context of each factual setting. We address ourselves to that task.

II.

Preliminarily, we note that the fact that the news medium here is a radio station rather than a newspaper does not make the First Amendment discussion, in particular with regard to freedom of the press, any less germane. Radio and television were of course, unknown media when freedom of the press was written into the Bill of Rights, but no rational distinction can be made between radio and television on the one hand and the press

on the other in affording the constitutional protection contemplated by the First Amendment. Rumely v. United States, 197 F.2d 166 (C. A. D. C. 1952), aff'd., 345 U. S. 41 (1953).

In our case the subject matter of the first set of broadcasts alleged by plaintiff to be defamatory is a series of police raids on alleged distributors and sellers of obscene matter. Such raids were made by the police only after public complaints about the widespread dissemination of obscene literature in the center city area of Philadelphia had provoked a major police investigation. We have no doubt that these raids were matters of public interest.

The second series of broadcasts dealt with the institution and development in a legal action by plaintiff and two publishers against an influential segment of the news media (all major local newspapers and the local CBS-TV affiliate), as well as against the City of Philadelphia, its Police Commissioner, and its district attorney to end harassment of plaintiffs in the operation of their businesses. Again, it is clear to us that the subject matter was of real public interest. Indeed, the Supreme Court has construed broadly the concept of a matter of an issue of public interest:

> "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable

the members of society to cope with the exigencies of their period.' Thornhill v. Alabama, 310 U.S. 88, 102." Time, Inc. v. Hill, 385 U. S. 374, 388 (1967).

Not only did the broadcasts under attack concern subject matter of public interest, but of equal significance they involved broadcasts of "hot news" items, i.e., summaries of the latest news given on the hour and the half hour in reports ranging from ninety seconds to ten minutes. In one of the ten minute broadcasts containing alleged defamatory matter there were eighteen separate items of news covered. The primary value of these items to the public is in conveying the latest news as promptly as possible so that it has the opportunity to be informed of news items of possible immediate public concern. It is not realistic to require thorough research or verification of each individual item under these conditions. The need for constitutional protection in the circumstances is much more apparent than in the cases of the so-called documentaries or feature stories where time is available to attempt to verify questionable material.

In its discussion of malice in connection with its consideration of the state law issue of punitive damages, the district court stated that "This is not then a case where a newsworthy incident occurs spontaneously and a news purveyor must rely on eyewitness accounts subject to the vicissitudes of human perception." Viewing these broadcasts from a First Amendment perspective, we think this was an unduly narrow evaluation of the function of the newscasts. The district court's approach in effect imposes a duty on the broadcaster to be "right" except in the most limited circumstances and therein lies its vice when judged by First Amendment standards.

III.

The district court concluded that the First Amendment was inapplicable because plaintiff was not a public figure within the meaning of that term as employed in

Curtis v. Butts, 388 U. S. 130 (1967). Contrary to the view of the district court, we do not consider the absence of a public figure of controlling importance here. Considering the type of news broadcasts involved as well as the established public interest in the subject matter, we conclude that the fact that plaintiff was not a public figure cannot be accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented. In Time, Inc. v. Hill, supra, the Court applied the Times rule to false reporting of "matters of public interest" in connection with an action for invasion of the right to privacy by a private individual. See also Linn v. United Plant Guard Workers, 383 U. S. 53 (1966), and Pickering v. Board of Education, 391 U. S. 563 (1968). Our conclusion finds support in similar rulings of other courts. United Medical Laboratories v. Columbia Broadcasting System, 404 F.2d 706 (9th Cir. 1968), cert. den., 394 U. S. 921 (1969); Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704 (S. D. Ga. 1969); All Diet Foods Distributors, Inc. v. Time, Inc., 290 N. Y. S. 2d 445 (Sup. Ct. 1967). See also Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969), cert. den., 395 U. S. 922 (1969).

It is our view that at least in the present factual context the proper accommodation between the First Amendment protections and the state law of defamation is found by requiring a plaintiff to meet the standard of proof formulated in New York Times Co. v. Sullivan, supra, i.e., that in order to recover damages here, plaintiff must prove that the statement was made with "actual malice"—either with knowledge that it was false or with reckless disregard of whether it was false or not. In adopting the accommodation reflected in the actual malice standard we are not precluding plaintiff and others in similar situations from recovering in actions for defamation of character. We are merely establishing the quantum and type of proof required to permit recovery. When the proof rises to the requisite level and quality:

"the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function." Time, Inc. v. Hill, supra, at 389.

IV.

It remains to be determined whether the evidence met the federal actual malice standard so as to be a proper case for the jury.[2] This we must do "to make certain that those [constitutional] principles have been constitutionally applied." Times v. Sullivan, supra at p. 285. Preliminarily, we note that the district court found "that no one at WIP harbored any personal animus toward the plaintiff, George Rosenbloom." But the district court found strong evidence of malice under Pennsylvania law from the four pieces of evidence. We realize that, strictly speaking, the district court did not evaluate the evidence by federal standards, but we, of course, must do so. We will now evaluate seriatim under the controlling federal standard the evidence which the district court isolated on the issue of malice.

Plaintiff made one attempt to contact the radio station. On October 26 or 27, he went to the studios of WIP in order to inquire about the substance of the broadcasts about his activities. He talked on an inter-office phone with a part-time news broadcaster of the station who, upon plaintiff's request, read to him the text of the noon broadcast of October 21. Plaintiff then told the newscaster that his periodicals were found not to be obscene by the United States Supreme Court. The newscaster answered that the district attorney had said that the magazines in question were obscene. Plaintiff disputed this saying he had in his possession a statement by the district attorney saying that plaintiff's magazines were legal. The broad-

[2] We put aside the issue as to whether the jury instructions could be construed to have complied with the Times standard.

caster then apparently hung up on him. This ended plaintiff's contact with the radio station.

The district court equated this incident with a refusal to broadcast a retraction[3] or worse. We think the evidence of the incident lacked both sufficient substance and clarity to meet the standard required to show actual malice. It amounted to little more than an argument and a difference of opinion between plaintiff and one of defendant's employees at a time when all except one of the challenged broadcasts had already taken place. Its value in considering the earlier broadcasts is dubious at best. Only one broadcast took place after this conversation. It is attacked on the ground that it contains an inaccurate statement concerning plaintiff's injunction action in that it stated that the district attorney considered plaintiff's publications to be smut and immoral literature. The transcript of the testimony shows that plaintiff's own attorney, when questioning defendant's representative concerning the allegedly defamatory portion of the last broadcast, said that he was not questioning its "accuracy". Furthermore, his examination of the same witness brought out that defendant's representative confirmed the story with the judge involved before the broadcast was made. We think that the episode described failed to provide evidence of actual malice with the requisite convincing clarity to create a jury issue under federal standards.

The district court next points to the failure of defendant's representative to confront plaintiff personally about the matter and its failure to look at the magazines to determine whether they were obscene as evidence of "a reckless disregard for a person in no position to make himself heard." We think the burden the district court would place on defendant is not constitutionally permissible under the Supreme Court cases. Defendant was reporting fresh news developments consisting of activities and

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[3] In the Times case the Supreme Court queried, "Whether or not a failure to retract may ever constitute such evidence" [of malice when judged by constitutional standards] at p. 286.

charges made by public authorities and counter activities by the plaintiff in an area of public concern. Considering the subject matter and defendant's function, the First Amendment insulated it from the duty which the district court would impose on it as a matter of Pennsylvania law. Moreover, this record does not show that defendant was on notice of any challenge to the accuracy of its reporting until after the next to the last broadcast. We have already noted that the accuracy of the last broadcast was first checked with the judge involved and its accuracy also apparently conceded at the trial. If, as might also seem to be the case, the district court evaluated such evidence on the basis of the standard of proof suggested in Justice Harlan's minority opinion in the Butts case,[4] our answer must be that we think the controlling rule should be the same as the Times rule which was applied by a majority of the Justices in the Butts case.

Finally, the district court concluded that the highly inflammatory references (girlie-book peddlers and smut distributors) in the second series of broadcasts constituted evidence of a reckless disregard of plaintiff's rights. But, as the Supreme Court said in Garrison v. Louisiana, 379 U. S. 64, 74 (1964), "only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." It is difficult to see how characterizing them as inflammatory tends to prove the requisite awareness of their probable falsity.

We conclude that the First Amendment standard of actual malice is applicable to the case and that the evidence was constitutionally insufficient to support a judgment for plaintiff. The district court should have granted defendant's motions for a directed verdict and for judgment n.o.v.

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[4] " * * * a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Butts, supra, at p. 155.

The judgment of the district court will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

ORDER

It Is Ordered that the following footnote 5 be inserted after the letters "n. o. v." on page 11 of the slip opinion:

"5. Plaintiff does not on appeal challenge our right to review on its merits the district court's denial of defendant's motion for judgment n.o.v. In any event, we think there was substantial compliance with F. R. Civ. P. 50(b)."

By THE COURT,
Collins J. Seitz,
Circuit Judge.

Date: October 6, 1969.

APPENDIX B

Opinion of the United States District Court for the Eastern District of Pennsylvania

JOSEPH S. LORD, III, J.

August 27, 1968

This is an action for libel. The plaintiff, a citizen of Pennsylvania, was at the time of the events which gave rise to the present action a distributor of nudist magazines in a territory including Philadelphia and the surrounding area. The defendant, Metromedia, Inc., a Delaware corporation with its principal place of business in New York, owns and operates a radio station in Philadelphia known as WIP.

The jury rendered a verdict in favor of the plaintiff of general damages in the sum of $25,000 and punitive damages in the sum of $725,000. The defendant has filed motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

The asserted liability of the defendant was based upon two series of broadcasts in the fall of 1963. The first series, October 4 and 5, dealt with raids on the plaintiff's home and warehouse and his arrest by the Special Investigations Squad of Philadelphia Police Captain Clarence Ferguson. The first broadcast was that of October 4, 1963 at 6:00 p.m.:

> "City Cracks Down on Smut Merchants
>
> "The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 2000 block of Welsh Road near Bustleton Avenue and confiscated 3000 obscene books. Captain Ferguson

says he believes they have hit the supply of a main distributor of obscene material in Philadelphia."

The substance of this broadcast was repeated seven more times. The only difference of any significance was that in the last six the script added the word "reportedly" or "allegedly" in referring to the books seized in the barn.

The second series, October 21, 25 and November 1, involved the plaintiff's action for an injunction against the allegedly illegal arrests and the publicity thereof. The broadcast of October 21, 1963, at 8:30 a.m. is representative:

> "Federal District Judge Joseph S. Lord, III,[1] will hear argument today from two publishers and a distributor, all seeking an injunction against Philadelphia Police Commissioner Howard Leary, District Attorney James C. Crumlish, Jr., a local television station and a newspaper, ordering them to lay off the smut literature racket.
>
> "The girly-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he'll decide the issue. It will set a precedent and if the injunction is not granted it could signal an even more intense effort to rid the city of pornography."

At 9:30 a.m. on the same day, defendant's broadcast was:

> "Smut distributors seek an injunction against police raids in Philadelphia."

All of the broadcasts in this series were replete with repeated references to "smut" and "girlie books". Furthermore, the plain implication of the broadcasts was that the

[1] The judge in question was in fact the Hon. John W. Lord, Jr.

plaintiffs in the Federal Court were attempting to halt the general campaign against pornographic literature. The unmistakable inference was that plaintiffs wanted to stop all raids throughout the city, even as against literature that was, in fact, pornographic and even though they had nothing to do with its distribution. Thus, at 2:00 p.m. on October 21, defendant described the plaintiffs as:

> "* * * asking an injunction against further raids by police and the District Attorney's office on smut publications. The complainants charge they are being hurt financially. * * *"

Again (October 21 at 4:30 p.m.), the broadcast had complainants going before "Judge Gold"[2]:

> "* * * claiming they are suffering economic and financial hardship because of a recent crackdown on smut material."

The suit(OUTDOOR AMERICAN CORP. et al. v. CITY OF PHILADELPHIA, et al. C. A. No. 34316) was, in fact, only concerned with plaintiffs' publications. It asserted that the publications were not obscene and sought to protect only their own assertedly lawful business.

There is no evidence of what investigation was conducted by defendant other than a reliance on Captain Ferguson for the first series of broadcasts. Captain Ferguson, who had never been to the Philadelphia Art Museum and who was uncertain of its location, conceived of obscenity as:

> "A. Any time the private parts is [sic] showing of the female or the private parts is [sic] shown of males and they are offered for sale to the public, that is what I consider the answer, Mr. Paul."

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[2] A Common Pleas Court judge not involved at all.

I.

NEW YORK TIMES COMPANY v. SULLIVAN, 376 U.S. 254 (1964), laid down the First Amendment rule applicable to libel actions by public officials (376 U.S. at p. 279-280):

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. * * *"

CURTIS PUBLISHING CO. v. BUTTS, 388 U.S. 130 (1967) considered the impact of *Sullivan* on suits brought by those who are not public officials, but who are "public figures". In that case, Mr. Justice Harlan enunciated a rule formulated somewhat differently from that of *Sullivan*. The Chief Justice, in Part I of his concurring opinion, said (388 U.S. at p. 164):

> "I therefore adhere to the New York Times standard in the case of 'public figures' as well as 'public officials.' * * * "

Four other Justices concurred in Part I of the Chief Justice's opinion. It may therefore be said that the *Sullivan* standard is applicable to cases of "public figures". See CEPEDA v. COWLES MAGAZINE AND BROADCASTING, INC., 392 F. 2d 417 (C. A. 9, 1968), at page 421. The question is does it apply here, a question that is by no means free of difficulty.

In *Butts*, Mr. Justice Harlan said, at page 133:

> "* * * We brought these two cases here * * * to consider the impact of that decision [Sullivan] on libel actions instituted by persons who are not public

> officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest. * * * "

It would thus appear that, having referred to the "figures" and the "issues" in the conjunctive, the Court intended the scope of *Butts* to reach only those cases where both the criteria of a public figure and a public issue were satisfied. And if this is so, we would have no difficulty in concluding that *Butts* does not govern here. George Rosenbloom was not, before defendant's onslaughts, a public figure. Unfortunately, Justice Harlan did not stop with the neat formulation of the reach of *Butts*. Footnote 19 (388 U.S. at p. 155) reads:

> "Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures *or* matters of public interest." (Emphasis added)

Is this later use of the disjunctive to be taken to mean that one not a public figure may nonetheless have to bear the heavy constitutional burden if he is libelled in a matter of "public interest"? We think not.

Application of the constitutional privilege in the law of libel requires a delicate balancing of the freedoms of speech and press on the one hand, and the right of the individual to be free from injury to his reputation by defamation on the other. It cannot be gainsaid that in substituting redress in the courts for violence as a means of vindicating personal rights the law of defamation serves a very useful social function, ROSENBLATT v. BAER, 383 U.S. 75, 86 (1966), a function no less important than that performed by the laws which provide compensatory redress for intentionally or negligently inflicted injury.

In restricting the ambit of recovery in libel actions brought by public officials and "public figures" the Supreme Court has recognized that in light of the values served by the freedoms of speech and the press, certain persons are entitled to more protection than others from injuries to

reputation. Underlying the recent decisions of the Court is the notion that by their activities and their status prominent persons have assumed to some extent the risk of injury due to negligently reported falsehoods and because of their access to the media of mass communication are able to protect themselves from such injuries more adequately than others. In *Butts* Justice Harlan adverted to "the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies,' Dennis v. United States, 341 U.S. 494 * * *." 388 U.S. at 153. Noting that in personal injury cases the courts have "given much attention to the importance of defendants' activities," the Justice said that "[t]he courts have also, especially in libel cases, investigated the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense." 388 U.S. at 154. In describing the two respondents in *Butts* and *Walker*, Justice Harlan said (388 U.S. at 154-155):

> "* * * [B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. * * * Butts may have obtained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but *both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements.* Whitney v. California, 274 U.S. 357, 377 (Brandeis, J., dissenting)." (Emphasis added)

The Chief Justice, in his concurring opinion, described these "public figures" as individuals who are "intimately involved in the resolution of important public questions or,

by reason of their fame, shape events in areas of concern to society at large." 388 U.S. at 164. "And surely as a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities." *Id.*

We may concede that the suppression of crime is a matter "in which the public has a justified and important interest." BUTTS, *supra*. However, we must also conclude that the libelee's access to means of public rebuttal of public libel is an important, if not essential factor in determining the application *vel non* of the constitutional standard. Speech cannot rebut speech nor propaganda answer propaganda where millions of listeners are available to one side, and the other side finds the telephone hung up when he attempts to protest. Such a brobdingnagian-lilliputian contest is scarcely calculated "to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." BUTTS, *supra*, at p. 153.

The Supreme Court has not yet adopted First Amendment absolutes. *Cf.* Justice Black's concurring opinion in NEW YORK TIMES COMPANY v. SULLIVAN, 376 U. S. at 293. And yet, to insist upon the application of a constitutional standard under circumstances such as these would mean that a person, even though not a public figure, who is accused of crime, however negligently and however falsely, would be denied redress in the courts. We think the philosophy underlying the Supreme Court's opinion precludes such a drastic result.

Rosenbloom was in no sense a public man. Indeed, he was of so little importance that when he approached the defendant seeking a hearing to prove to those in charge that his magazines were neither obscene, nor smut, nor "girlie-books", he was summarily cut off and ignored. Rosenbloom was isolated from public view until

others had thrust him into it, and when the news media finished with him he was in a very real sense defenseless save to the extent that the libel law of Pennsylvania afforded him protection. We conclude, therefore, that because of his public anonymity, which precluded meaningful access to the news media as a means of protecting his reputation, even though he was tangentially involved in a public issue, plaintiff is protected by Pennsylvania libel laws without First Amendment strictures.

II.

We turn, then, to Pennsylvania law.

The defendant argues that the court erred in its charge that the conditional or qualified privilege with which the defendant was clothed as a news medium reporting the news[3] could be abused by a showing of something less than actual malice.

In the first place, it is not at all clear that the privilege obtains in the report of a "judicial proceeding" when no "official action has been taken by the officer or body whose proceedings are thus reported." REST., TORTS, § 611, Comment C. However, assuming *arguendo* that the conditional privilege did attach, we cannot agree that only actual malice will overcome it.

"Want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication, will destroy the privilege * * * . O'DONNELL v. PHILADELPHIA RECORD CO., 356 Pa. 307, 315 (1947). See also ALTOONA CLAY PRODUCTS, INC. v. DUN & BRADSTREET, INC., 367 F.2d 625 (C.A. 3, 1966); BAUSEWINE v. NORRISTOWN HERALD, INC., 351 Pa. 634, 645 (1945); MULDERIG v. WILKES-BARRE TIMES, 215 Pa. 470, 474 (1906). And in PURCELL v. WESTINGHOUSE BROADCASTING CO., 411 Pa. 167, 179 (1963), the court said:

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[3] Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167 (1963); Rest., Torts, §611.

"* * * where libel is involved, malice is not necessarily synonymous with malignance of temper, vengefulness of spirit, or personal prejudice, attributes which usually go with 'malice' in non-legal parlance. Legal malice can generate from a reckless and wanton disregard of another's rights. It may arise from a 'want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication.' The failure to employ such 'reasonable care and diligence' can destroy a privilege which otherwise would protect the utterer of the communication. (Montgomery v. Dennison, 363 Pa. 225)."

In addition, the defendant was not prejudiced by any putative error of the court in instructing that the jury could find an abuse of the privilege based on conduct less than malicious or reckless since in awarding punitive damages the jury applied the standard now urged on the court and found, and was warranted in finding, malice or recklessness. (See discussion under V, infra). "Although the 'actual malice' instructions were not also given in connection with the compensatory damage issue, it is difficult to conceive how petitioner could have been prejudiced by that failure in view of the fact that the jury, guided by 'actual malice' instructions, awarded $3,000,000 in punitive damages." CURTIS PUBLISHING CO. v. BUTTS, supra, at p. 166.

III.

The defendant moves that judgment be entered in its favor because there was no showing that the defamatory broadcasts caused the plaintiff any injury; because there was no proof that any listener believed the broadcasts to be defamatory; and because there was no proof that any listener believed that the plaintiff was the subject of the second series of broadcasts.

Where a publication is libelous *per se*—that is, defamatory on its face—it is actionable *per se;* one need not prove that he received any injury as a result of the publication in order to recover damages. "In such a case, general damages for loss of personal or business reputation are recoverable and no averments or proof of special damages are necessary." COSGROVE STUDIO AND CAMERA SHOP, INC. v. PANE, 408 Pa. 314, 319 (1962). Compare, e.g., CONTINENTAL NUT COMPANY v. ROBERT L. BERNER COMPANY, 393 F.2d 283 (C. A. 7, 1968) (libel per quod).

Such words as "girly-book peddlers" and "smut peddlers" are defamatory on their face and "need no extrinsic proof of [sic] explanation." 408 Pa. at 319. It is immaterial, then, that the plaintiff introduced no evidence that any listener considered the broadcasts defamatory. "The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient." REST., TORTS, § 614(2). See also WEIDER v. HOFFMAN, 238 F. Supp. 437 (M. D. Pa. 1965).

The defendant complains that the plaintiff offered the testimony of not a single witness that the second series of broadcasts, which did not identify the plaintiff by name, were taken to refer to the plaintiff. We left it for the jury to determine whether a reasonable listener, in view of all the circumstances, would have concluded that the broadcasts referred to plaintiff where they did not mention plaintiff by name. This was in accord with the law of Pennsylvania.

In CLARK v. NORTH AMERICAN CO., 203 Pa. 346 (1902), the court said, at page 352:

> " * * * The proper way to submit it to the jury was to call their attention to the fact that the name used in the article did not refer to the plaintiff, but to one John Clark, a different person, but on the other hand the description pointed directly to the plaintiff and the jury should consider the whole article and

> determine from all the evidence, whether, notwithstanding the difference of name, the description was such either intentionally or by want of due care and diligence in ascertaining the true facts, that there would be a natural and reasonable inference that the plaintiff was the person referred to. If there would, the defendant was liable. * * * "

The jury was free to find that the second series of broadcasts referred to the plaintiff from the surrounding circumstances, to wit, that the plaintiff here was the plaintiff in the federal action which the broadcasts purported to report. The news director of WIP, Mr. Rust, was a broadcaster and a listener who knew that the second series of broadcasts was, and was intended to be, about the plaintiff. The law is clear that "[t]he fact that the plaintiff is not specifically named in the [publication] is not controlling. A party defamed need not be specifically named, if pointed to by description or circumstances tending to identify him: Burkhart v. No. American Co., 214 Pa. 39, 63 A. 410 (1906) * * *." COSGROVE STUDIO AND CAMERA SHOP, INC. v. PANE, *supra*, at 319.

In *Burkhart*, *supra*, it was held that the plaintiff was sufficiently identified in an article which referred to a bassoon player in the orchestra where the plaintiff was the orchestra's only bassoon player. So here, it would appear that Rosenbloom was the only distributor of nudist magazines in Philadelphia then in the process of seeking an injunction in the federal courts against raids.

IV.

The plaintiff was acquitted in his criminal trial springing from the arrest. The Pennsylvania court ruled as a matter of law that the magazines were not obscene. The admission into evidence of this acquittal and its use by the court are the bases of two assignments of error.

The defendant excepted to the court's charge that "Eden", the magazine purveyed by the plaintiff, was not obscene as a matter of law in the legal sense. See, *e. g.*, LUROS v. UNITED STATES, 389 F.2d 200 (C. A. 8, 1968). As to the defense of truth of defendant's characterization of "Eden" as "obscene," the court bifurcated the issue and instructed the jury that they must first decide whether the defendant used the word in the legal or in the lay sense. If they decided that it was used in the legal sense, the defense would fail. If used in the lay sense, the question of truth was for them to decide.

In its ruling that the magazines were not obscene in the legal sense as a matter of law, the court considered the opinion of Judge Ullman in the criminal prosecution in which the plaintiff was acquitted. We did so, however, not as a matter of applying State law under ERIE R. Co. v. TOMPKINS, 304 U. S. 64 (1938), but in order to determine whether the defense of truth was sufficient to go to the jury. To the extent that this essentially factual question turned on the content of the State obscenity law, the court made a legal determination. What our instruction reflected was a finding, as a matter of law, that the defendant failed to sustain its burden of proof that the magazines were obscene in the legal sense. The defendant offers no argument in its present motions that convinces us that this charge was in any way erroneous.

A related assignment by the defendant is that the plaintiff was allowed to introduce evidence of his acquittal in the criminal case and that the admission of such evidence was erroneous and prejudicial. We cannot agree.

Throughout the trial the defendant presented to the jury its defense of truth, *i. e.*, that the magazines were indeed obscene and smut and that the plaintiff was properly yclept a "smut peddler", etc. To this end the defendant adduced evidence that the plaintiff had been arrested on two occasions for the sale of the magazines in question and prosecuted under the state's obscenity law.

It should be noted, moreover, that calling a person a smut peddler and a distributor of obscene literature clearly imputes the commission of a crime, especially when it is reported that an arrest therefor has been made. Thus, the persistent defense of truth itself operated to blacken the character of the plaintiff in the eyes of the jury, not just making him out to be a seller of dirty books, but also one who is not above committing crimes in order to make his livelihood.[4] It is unthinkable that the jury not know the plaintiff had been acquitted of the charges against him. *Cf.* PURCELL v. WESTINGHOUSE BROADCASTING CO., *supra*, p. 183.

V.

The defendant argues that the award of punitive damages was improper because the evidence was insufficient that the defendant's conduct was malicious or reckless. The court properly charged on the law of Pennsylvania as to the standard for assessing punitive or exemplary damages:

> "Secondly, if you find that this publication arose from a bad motive or malice toward the plaintiff, or if you find that it was published with reckless indifference to the truth, if you find that it was not true, you would be entitled to award punitive damages, and punitive damages are awarded as a deterrent from future conduct of the same sort.
>
> "They really are awarded only for outrageous conduct, as I have said, with a bad motive or with reckless disregard of the interests of others, and before you would award punitive damages you must find that these broadcasts were published with a bad motive or with reckless disregard of the rights of others, or reckless indifference to the rights of

[4] There is authority that such persistence in the defense of truth may be evidence of the actual malice necessary for punitive damages. Montgomery v. Dennison, 363 Pa. 255, 267 (1949).

others; so that your verdict should be, if you find for the plaintiff, in two parts; one, general damages and, two, punitive damages."

See PURCELL v. WESTINGHOUSE BROADCASTING CO., 411 Pa. 167, 187 (1963).

To begin with, it is clear that no one at WIP harbored any personal animus toward the plaintiff George Rosenbloom. We are convinced, however, that there was sufficient evidence of a reckless disregard both of the truth of the defamatory assertions and the rights of the plaintiff to warrant the finding of punitive damages.

As the Pennsylvania Supreme Court said in CLARK v. NORTH AMERICAN CO., 203 Pa. 346, 354 (1902):

> "There was evidence in the case on which the jury might have found punitive damages, and it was error to take that matter away from them. The refusal or neglect to publish a retraction as to plaintiff after he had called defendant's attention to the injustice done him was in itself sufficient, and in this connection the tone and wording of the article itself as indicative of a desire to make a sensation, * * * were open for the consideration of the jury. * * * *"

Here is what happened when plaintiff tried to call "defendant's attention to the injustice done him." Late in October of 1963, about the 26th or 27th, the plaintiff, after hearing about the broadcasts that WIP had made concerning him, visited the station's offices and asked to hear or read the broadcasts so that he might determine whether or not what he had heard was true. He spoke to representatives of the news department by means of a telephone in the reception area, and the conversation was mechanically recorded. He specifically asked to hear and was read the 12 o'clock news broadcast of October 21, 1963. What was read to him referred to smut peddlers.[5]

[5] The broadcast for that time in the record referred to *alleged* smut literature.

When confronted with the article the plaintiff told the newscaster who read the broadcast to him, a man who identified himself as "Nate Wright," that the magazines in question "were found to be completely legal and legitimate by the United States Supreme Court." The plaintiff testified further as follows:

> "And the voice came back, 'Well, the District Attorney said they are obscene.'
>
> "I said, 'Are you sure you are quoting the District Attorney correctly because I have in my possession a public statement by the District Attorney that my magazines are completely legal, absolutely nothing obscene about them.' " (N.T. 175).

Thereupon, "Nate Wright" hung up.

There could be no more effective refusal to broadcast a retraction. Indeed, the jury may properly have thought (and we would agree) that this was even more reprehensible than a refusal to make a retraction. Plaintiff was not even accorded an opportunity to present his side of the story so that WIP could intelligently decide whether it should make a retraction. Such conduct is strong evidence of a lack of a good faith effort to ascertain the truth about the plaintiff and his business. It was a reckless disregard both of the truth of the previous broadcasts and of the rights of the plaintiff in the face of the plaintiff's representation that he was prepared to document his position that the District Attorney had stated that the magazines were not obscene.

Had WIP's representatives spoken with Mr. Rosenbloom or looked at the magazines and had still entertained an honest belief that the material was obscene or smut there might have been some basis for a finding that defendant was not reckless. But the abbreviated conversation with the plaintiff by telephone in defendant's offices, without confronting the plaintiff personally or examining the documentation he offered, was such depersonalizing

conduct as to manifest a reckless disregard for a person in no position to make himself heard.

The conduct of WIP when approached by the plaintiff, sufficient in itself as a basis of liability for punitive damages under CLARK v. NORTH AMERICAN CO., *supra*, was not the only evidence of a reckless disregard of the truth and of the rights of the plaintiff. The second series of broadcasts on October 21, 25 and November 1, describing a suit brought by the plaintiff to enjoin the raids and the reporting of them, contains defamatory assertions that were clearly false and was made at a time when the falsity of the assertions was readily ascertainable, both from an examination of the court records and of the magazines themselves. This is not then a case where a newsworthy incident occurs spontaneously and a news purveyor must rely on eyewitness accounts subject to the vicissitudes of human perception. *Cf.* ASSOCIATED PRESS v. WALKER, *supra*. The facts about which the broadcasts revolved were essentially static: what kind of magazines did the plaintiff sell; what was the nature of the suit he brought to protect his business.

Content with its ignorance of facts which would have been revealed upon the examination of material evidence, WIP relied on hearsay, and knowing its information was hearsay (or worse, conjecture), had the temerity to report that Mr. Rosenbloom and the publisher were "girly-book peddlers" and "smut distributors". These words are so highly colored that they smack of editorializing and a desire to create a sensation.[6] The broadcast of such language to describe a magazine distributor, because of its

[6] Malice may sometimes be proved intrinsically. An instruction to the jury to find "whether the publication itself, in its tone and format, revealed such malice as robbed it of its privileged character" was upheld in O'Donnell v. Philadelphia Record Co., *supra*, at 316. Although this was the "malice" that destroys the privilege, the "tone and format" of WIP's broadcasts, coupled with the evidence of the failure to verify the information they received, was properly for the jury's consideration and sufficient to find recklessness here.

great defamatory impact, supports part of "the basic theory of libel," that "words defamatory of another, are still placed 'in the same class with the use of explosives or the keeping of dangerous animals.' Prosser, The Law of Torts, §108, at 792." CURTIS PUBLISHING CO. v. BUTTS, *supra*, at 152. The jury could reasonably infer that the defendant was aware of this potential danger. It could properly conclude that the defendant's failure to examine material evidence which was available and yet to make such defamatory characterizations, knowing that such basic investigation had not been made, constituted a recklessness of conduct as to the rights of others sufficient to warrant punitive damages. Because the evaluation of the defendant's conduct necessitates an intrinsically subjective inquiry, we refuse to meddle with the fact-finding function of the jury.

Defendant at no time sought separate rulings by the court on the two different sets of broadcasts. It is now in no position to complain that the first set may not have afforded the basis for punitive damages. Since defendant itself was content to treat its conduct as one ball of wax, it cannot now complain that it was so treated in the verdict. Any other result would mean that a defendant, confronted with two bases of recovery, one of which may be vulnerable and the other not, could sit back and await an unfavorable result confident that he could successfully attack the entire verdict. This is not the intendment of F. R. Civ. P. 50(a) which commands that "[a] motion for a directed verdict shall state the specific grounds therefor."

The defendant assigns as error the court's failure to charge that the award of punitive damages must have a reasonable relationship to the amount of compensatory damages in accordance with the law of Pennsylvania. This is the general rule in Pennsylvania[7] and apparently applies in libel cases as well.[8]

[7] Suflas v. Cleveland Wrecking Co., 218 F. Supp. 289 (E. D. Pa. 1963).

[8] See Purcell v. Westinghouse Broadcasting Co., 411 Pa. 167, 187 (1963).

Although numerous points for charge were submitted by both sides, defendant made no request for such an instruction. At the conclusion of the charge, defendant excepted only to the submission of the question of punitive damages to the jury at all. The only "grounds of his objection," F. R. Civ. P. 51, were that this was not "a case in which there were facts for the jury to consider."

Federal Rule of Civil Procedure 51 provides that: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." In PALMER v. HOFFMAN, 318 U.S. 109, (1942) the Court said, at page 119:

> "* * * In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the *precise nature* of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. * * *" (Emphasis added)

Defendant's exception here not only fell short of suggesting substantive error in charge; indeed, it suggested that if punitive damages were recoverable, the charge was legally correct.

Nor is this a case of fundamental error going to the very issue of liability, as in the cases cited by defendant. MAZER v. LIPSCHUTZ, 327 F. 2d 42 (C. A. 3, 1964) (failure to charge on the vicarious liability of a surgeon); RATAY v. LINCOLN NATIONAL LIFE INSUR. CO., 378 F. 2d 209 (C. A. 3, 1967) (erroneous charge that burden of proof for defense of fraud could be sustained by a fair preponderance of the evidence). SUFLAS v. CLEVELAND WRECKING CO., 218 F. Supp. 289 (E. D. Pa. 1963) did not involve a determination of fundamental error. The only non-

substantive point briefed, argued and decided in that case was whether the failure to charge on necessary relationship between compensatory and punitive damages was harmless error.

We are not here concerned with whether the error was harmless, but whether it was so fundamental that an entire new trial should be ordered, even though the only question would be the amount of punitive damages. For that question could not be determined without showing the totality of the circumstances. And this, only because of the lack of an instruction which defendant failed to request. The salutary purpose of Rule 51 was to prevent just such an horrendous result, and we refuse to disregard that purpose.

VI.

A

The defendant argues that it was error for the court to admit certain "hearsay" testimony by the plaintiff of what certain newsboys with whom he dealt said to him. One newsboy said, according to the plaintiff, that "WIP radio was really blasting me, they were really knocking me." The plaintiff then testified as to the effect of this statement on him.

This testimony of the plaintiff was not admitted for the truth of its assertion, to wit, that WIP was in fact "blasting" the plaintiff (this was already in evidence through the introduction of the scripts), but to show what effect this statement had on the plaintiff. It constituted a verbal act.

B

The plaintiff testified that 34 of his original 60 customers refused to do business with him, and that "They told me, in fact, 'You are a racketeer. We won't have anything to do with you.' "

The reasons given by the plaintiff's customers for refusal to deal constituted a well-established exception to the hearsay rule: "a declaration of a present existing *motive* or *reason* for action." WIGMORE, EVIDENCE §1729(2), Vol. VI (3d Edition); DE RONDE v. GAYTIME SHOPS, INC., 239 F. 2d 735, 739 (C. A. 2, 1956), (a defamation case).

In any event, that evidence was offered and admitted solely on the issue of special damages. Since that issue was taken from the jury, the error, if any there was, was not prejudicial to defendant.

C

The defendant charges that it was error for the court to exclude the testimony of Paul Rust, news director of WIP, concerning the verification and investigation practices of other news departments in the Philadelphia community. The defendant is correct in its position that Rust's testimony was relevant. It was, however, incompetent because it was based on hearsay as to what other newsmen and news directors had told Rust.

VII.

Although there was warrant in the record for assessing punitive damages, we believe that $725,000 is excessive in light of the function that punitive damages serve; punishing the defendant for its conduct in regard to the present case and deterring future derelictions. This is not to say that the award was the result of bias or prejudice. The jury may, however, have been unduly impressed by the fact that the worth of the defendant was estimated to be approximately $100,000,000. Since we are convinced that the award punishes the defendant far beyond the needs of this case, it is our duty to order a remittitur or a new trial. LINN v. UNITED PLANT GUARD WORKERS

OF AMERICA, 383 U. S. 53, 65-66 (1966). This duty of the court has been stated broadly:

> "* * * The court may set aside an award of punitive damages deemed to be excessive or against the weight of the evidence, or larger in amount than the court thinks it justly ought to be. The trial court has a greater role than the court on appeal but we may note that its function may encompass a duty, and not merely an opportunity, to avoid excessive damages by remittitur or new trial. [citing Linn, supra]. * * *" Afro-American Publish-Co. v. Jaffe, 362 F.2d 649, 662 (C. A. D. C. 1966).

Cf: CURTIS PUBLISHING CO. v. BUTTS, *supra*, at 160.

The practice of the Pennsylvania courts in reducing punitive damage awards deemed excessive has been flexible. In *Purcell* the court reduced a punitive damage award "with justice to all parties concerned," 411 Pa. at 188, in spite of the fact that it stated: "The learned court below, in an able opinion, reasoned the justification of this award and we cannot say that it was not warranted in its rationalization." *Ibid.*, at 187.

Our conclusion that the punitive damages awarded are excessive is not based upon the fact that the plaintiff, entitled only to $25,000 compensatory damages, would receive a hugh windfall. The theory of punitive damages does not take into consideration the degree to which the plaintiff will benefit from the award. Rather, we look to the seriousness of the defendant's conduct and the degree to which it will be punished and deterred by this award. Our reaction is admittedly visceral. We conclude that punitive damages in the sum of $250,000 will adequately and justly both punish the defendant and deter it from future reckless conduct.

We have considered the other grounds urged by defendant and find them without merit.

APPENDIX C

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 28, 1968, be, and the same is hereby reversed and the case remanded to the District Court for entry of judgment in favor of appellant. Costs taxed in favor of appellant.

ATTEST:

/s/Thomas F. Quinn
Clerk